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October 5, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: February 15, 2006

Case Number: TSO-0360

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter "the Individual") for continued access authorization. This decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's access authorization should be restored. For the reasons detailed below, it is my decision that the Individual's access authorization should not be restored.

I. APPLICABLE REGULATIONS

The regulations governing the Individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." Under Part 710, the DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). After such derogatory information has been received and a question concerning an individual's eligibility to hold an access authorization has been raised, the burden shifts to the individual to prove that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." *See* 10 C.F.R. § 710.27(a).

Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. In considering derogatory information, the DOE considers various factors including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). The ultimate decision concerning eligibility is a comprehensive, common sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a).

II. BACKGROUND

The Individual has been employed by a contractor at a DOE facility in a position which requires him to have an access authorization. During the course of a Local Security Office's (LSO) background reinvestigation of the Individual, the LSO discovered derogatory information concerning the Individual's use of marijuana and cocaine as well as the Individual's failure to provide accurate information submitted in two Questionnaires For National Security Positions (QNSP) and a Letter of Interrogatory (LOI). The LSO then conducted a Personnel Security Interview (PSI) with the Individual in September 2005 to inquire about the derogatory information.

In June 2006, the LSO informed the Individual that the Individual's use of marijuana and cocaine constituted derogatory information that created a substantial doubt as to the Individual's continued eligibility for an access authorization under 10 C.F.R. § 710.8(k) (Criterion K). December 2005 Letter from Manager, Personnel Security Division, to Individual (Notification Letter). The LSO also cited the Individual's failure to provide a truthful answer in a 2004 QNSP regarding whether he had ever used illegal drugs while in possession of a security clearance as derogatory information under 10 C.F.R. § 710.8(f) (Criterion F). Additionally, the LSO cited as Criterion F derogatory information the Individual's failure in a 1995 QNSP and in the 2004 QNSP to provide an accurate answer to the question of whether he had ever been charged or convicted of an offense concerning alcohol or drugs. Also cited as Criterion F derogatory information was his failure to disclose in a 1992 Personnel Security Interview and in a 1991 LOI that he had previously used cocaine. The LSO's Notification Letter also referenced the Individual's use in 1993 and 1996 of marijuana while having a security clearance and in spite of having signed a DOE Drug Certification in 1992 and a Security Acknowledgment in 1995 as derogatory information under 10 C.F.R. § 710.8(l) (Criterion L).

A hearing was held in this matter. At the hearing, the Individual was represented by counsel. The Individual offered his own testimony, as well as that of a friend, his pastor and a former supervisor. The Individual also submitted four letters attesting to his character.

III. ANALYSIS

The facts are not in dispute in this case. A brief summary is provided below.

The Individual has sporadically used illegal drugs. In 1973 or 1974, the Individual used cocaine on a single occasion. DOE Exhibit (Ex.) 15 at 33 (use of cocaine at age 16 or 17). The Individual also purchased and used marijuana intermittently during the period from 1975 to 1984. Ex. 16 at 6. The Individual was arrested in 1975 for Underage Drinking (alcohol) and possession of marijuana. Ex. 16 at 6; Ex. 15 at 69; Ex. 14 at 7.

In 1991, the Individual completed a QNSP to obtain a security clearance in connection with his employment. Ex. 14. Later that year, the Individual completed a Letter of Interrogatory (LOI) in which he detailed his prior use of illegal drugs. Ex. 11. In that LOI, the Individual identified marijuana as the only illegal drug he had ever used. Ex. 11 at 1. During a Personnel Security

Interview conducted in April 1992, the Individual also denied using any illegal drugs other than marijuana. Ex. 16 at 10. Later in that month, the Individual signed a DOE Drug Certification in which he provided written assurance that he would not use or become involved with illegal drugs for as long as he was employed in a position requiring a DOE security clearance. Ex. 9.

In June of 1993, the Individual was arrested for Driving Under the Influence of Alcohol and admitted to the arresting officers that he had smoked marijuana prior to the arrest. Ex. 15 at 51; Ex. 17 at 21. The arresting officers found a small amount of marijuana present on the Individual during this arrest. Ex. 15 at 24-25; Ex. 17 at 22. The Individual subsequently completed another QNSP in 1995. Ex. 13. Along with the 1995 QNSP, the Individual signed a DOE Security Acknowledgment form stating "I understand that . . . any involvement with illegal drugs could result in the loss of my DOE security clearance." Ex. 10 at 1.

In 1996, the Individual used marijuana during a weekend camping trip. Ex. 15 at 27. During a random drug test given by his employer after the camping trip, the Individual's urine sample was found to be positive for marijuana. Ex. 15 at 8, 27-28. After this positive drug test the Individual attended and completed a Christian 12-step treatment program. Transcript of Hearing (Tr.) at 67; Individual Exhibit (Ind. Ex.) C; Ex. 15 at 27-29. During the period of time encompassing the Individual's 1993 arrest and his positive test for marijuana in 1996, the Individual held a security clearance. Ex. 2 at 2.

In 2004, the Individual completed another QNSP. In it he was asked if he had ever been charged or convicted of any offense related to drugs or alcohol. The Individual answered "No." Ex. 12 at 7. In the 2004 QNSP the Individual was also asked if he had used or been involved with illegal drugs while holding a security clearance. The Individual again answered "No." Ex. 12 at 8. Subsequently, the LSO conducted a PSI with the Individual in 2005. In this PSI, the Individual admitted using marijuana in 1993 and 1996. Ex. 15 at 22-27; *see* Tr. at 15-16, 65-67. During this PSI, the Individual also admitted using cocaine in 1973. Ex. 15 at 15.

A. Criterion F

Criterion F describes a concern raised when a person has "[d]eliberately misrepresented, falsified, or omitted significant information from . . . a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization. . . ." 10 C.F.R. § 710.8(f). The DOE security program typically explains its concern about this kind of behavior in terms of trust. A person who makes false or misleading statements is not acting in a forthright and honest manner, and cannot be trusted to protect classified information and special nuclear material. *Personnel Security Hearing* (Case No. TSO-0044), 28 DOE ¶ 82,936 (2003).

Of the alleged falsifications cited in the Notification Letter the most significant (and recent) is that involving the 2004 QNSP. An examination of the record leaves little doubt that in response to a question in the QNSP asking if he had ever been charged or convicted of any offenses related to drugs or alcohol, the Individual failed to disclose that he had been previously been arrested for DUI in 1993. Ex. 12 at 7; Tr. at 55-56. Further, in response to another question in the

2004 QNSP, the Individual failed to disclose that he had used illegal drugs while holding a security clearance. Ex. 12 at 8; Tr. at 61-62.

In response, the Individual asserts that he did not report his 1993 arrest for DUI because his attorney advised him that the charge would be expunged from his record. Tr. at 55. He also stated by way of explanation that he had used his 1995 QNSP in filling out the 2004 QNSP and that he had answered “No” to that question in the 1995 QNSP. Tr. at 55-56. The Individual also admits that he failed to disclose his marijuana usage while possessing a DOE security clearance in his 1995 and 2004 QNSP. Tr. at 56-57, 62-63. With regard to the decision not to reveal he had used marijuana while holding a security clearance, he testified “Fear motivated, I’m sure, the decisions [not to reveal he had used marijuana while holding a security clearance], and I would be dishonest to say that it didn’t” Tr. at 63. He also went on to testify concerning his falsifications:

So I really -- all I can say is that any discrepancies, that I’m sorry, you know, . . . but I -- I don’t -- I didn’t intentionally try to deceive DOE, you know. Yeah, I’m a -- I was afraid of losing my job and stuff, and what has changed -- I didn’t like my job, anyway. If they give it back to me, I’ll take it, and I’ll take it under a new attitude, but I -- I don’t have fear issues, and many things have been resolved in the last couple of years in my spirit life that have completely cemented or foundationalized [sic] those fears

Tr. at 66-67.

While admitting the falsifications cited in the Notification Letter, the Individual believes that he has made significant changes in his life and has mitigated the concerns raised by the falsifications. The Individual believes that because of his recent marriage, changes in his spiritual life and his deeper participation in church, he can now be trusted to provide accurate information when asked and can be trusted with an access authorization. Tr. at 63. He also points out that while he did not disclose his illegal drug use to the DOE before because of concerns about losing his job, he now has his own business and now no longer would have motivation not to be candid with DOE. Tr. at 63-64.

The Individual also presented witnesses vouching for his honesty. His friend, an assistant pastor, has known the Individual for approximately 24 years. Tr. at 21-22; *see* Ind. Ex. A. He testified that he has spent a great deal of time over the years talking to the Individual and he believes that the Individual is someone he can share information with and who won’t judge him. Tr. at 29, 31. When asked about the Individual’s honesty, he stated, “I think that he has grown, like most of us, into a more mature man with greater levels of character, and that he’s been increasingly honest.” Tr. at 29. However, he also stated that “[o]verall I can’t really answer that question.” Tr. at 29.

His pastor for the past three years testified as to the Individual’s honesty. Tr. at 34. He stated that he trusts the Individual based upon his experience of the Individual sharing personal matters with him as a pastor. Tr. at 38, 40. The Individual’s pastor also stated that he has entrusted the

Individual with significant leadership responsibility at their church and with caring for others. Tr. at 40.

After considering all of the evidence in the record in this case, I find that the Individual has not presented evidence sufficient to mitigate the security concerns raised by his falsifications. The falsifications in the 2004 QNSP are relatively recent. Further, I can not conclude that the 2004 QNSP falsifications were an isolated event. The record indicates that the Individual provided inaccurate answers in his 1995 QNSP in denying that he had ever been charged with an offense related to illegal drugs or alcohol and whether he had ever used marijuana while holding a security clearance. *See* Ex. 13 at 7 (answering “No” to question “Have you ever been charged with or convicted of any offense related to drugs or alcohol”); Ex. 15 at 7-9, 51-56; Tr. at 16-18, 55 (DUI arrest in 1993); Ex. 15 at 23-26 (use of marijuana in 1993). Further, from the Individual’s testimony cited above, I am not certain that he accepts full responsibility for the falsifications.

While I believe that the Individual has made some significant changes in his life and is committed to his faith, I do not believe that the evidence he has presented is sufficient to negate the considerations discussed above. Consequently, I find that the Criterion F security concerns have not been mitigated.

B. Criterion K

It is beyond dispute that the use of illegal drugs raises security concerns. *See, e.g., Personnel Security Hearing, Case No. VSO-0104*, 26 DOE ¶ 82,758 at 85,556 (1996) (“[A]ny involvement with illegal drugs demonstrates a disregard for the law. In addition, an individual who uses and/or sells illegal drugs opens himself to blackmail or other forms of coercion”). Furthermore, drug use calls into question the user’s judgment and reliability. *See, e.g., Personnel Security Hearing, Case No. VSO-0023*, 25 DOE ¶ 82,761 at 85,579 (1995) (“any drug usage while the individual possesses a [security] clearance and is aware of the DOE’s policy of absolute abstention demonstrates poor judgment.”).

The Criterion K concerns arise from the named incidents of involvement with illegal drugs specified in the Notification Letter - one use of cocaine in 1973, an arrest for possession of marijuana in 1975, intermittent usage of marijuana during 1975 to 1984, and incidents of marijuana use in 1993 and 1996. There is no evidence of any use or involvement with illegal drugs since 1996, almost ten years ago, and two of the incidents cited are over 30 years in the past. After the most recent marijuana usage, the Individual completed a three-month Christian 12-step program. Because of the length of time, approximately ten years, that has elapsed since the last established use of any illegal drug, I find that the security concern raised by the Criterion K derogatory information outlined in the Notification Letter has been mitigated.

C. Criterion L

Criterion L concerns conduct tending to show that the Individual was “not honest, reliable, or trustworthy, or which furnishes reason to believe that the individual may be subject to pressure,

coercion, exploitation, or duress which may cause the Individual to act contrary to the best interests of national security.” 10 C.F.R. § 710.8(l).

The Individual’s use of marijuana while possessing a security clearance shows a serious lack of reliability. This is especially true since in 1992, the Individual signed a DOE Drug Certification stating that he would refrain from using illegal drugs but then went on to use marijuana in 1993 and 1996. Further, the Individual in 1995 signed a Security Acknowledgment stating that involvement with illegal drugs could result in the loss of his clearance and then approximately one year later used marijuana. In mitigation, these Criterion L incidents occurred approximately ten years ago. The witnesses who testified on behalf of the Individual and the letters that were submitted on his behalf attest to the Individual’s integrity, compassion, trustworthiness and his dedication to his faith. See Ind. Ex. A, B, C, and D. However, the Individual’s relatively recent falsification of his 2004 QNSP again calls into question the Individual’s reliability in complying with the requirements of possessing a security clearance, specifically, requirements concerning avoiding involvement with illegal drugs and the associated reporting requirements. Given the Individual’s lack of reliability in reporting information concerning illegal drug use as demonstrated by the 2004 QNSP and the reliability issues highlighted in the Criterion L information cited in the Notification Letter, I find that the Individual has failed to mitigate the concerns raised by the Criterion L derogatory information.

IV. CONCLUSION

As explained above, I find that the security concerns related to the Individual’s use of illegal drugs (Criterion K derogatory information) have been resolved. However, I find that the falsification concerns (Criterion F derogatory information) and the reliability concerns (Criterion L derogatory information) have not been resolved. I can not conclude that granting the Individual’s access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). Consequently, the Individual’s access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals

Date: October 5, 2006